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No. 96-431

In the Supreme Court of the United States

OCTOBER TERM, 1996

BLUE DIAMOND COAL COMPANY, PETITIONER

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, violates the Just Compensation Clause of the Fifth Amendment as applied to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 79 F.3d 516. The opinion of the

[1] The original federal party in this case was the Secretary of Health and Human Services. The Secretary's responsibilities under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, were transferred to the Commissioner of Social Security as of March 31, 1995. See Social Security Independence and Program Improvements Act of 1994 (1994 Act), Pub. L. No. 103-296, §§ 105(a)(1) and (2)(A), 108(h)(9)(A) and (B), 110(a), 108 Stat. 1472, 1487-1488, 1490. In accordance with Section 106(d) of the 1994 Act, the Commissioner of Social Security is substituted for the Secretary of Health and Human Services as a party in this case. 108 Stat. 1477; see also Sup. Ct. R. 35.3.

district court (Pet. App. 23a-37a) is reported at 174 B.R. 722.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1996. A petition for rehearing was denied on June 28, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.* (Coal Act or Act), enacted in response to a crisis in health care costs in the coal industry, had its origins in a series of collective bargaining agreements between coal mine operators and the United Mine Workers of America (UMWA). Those contracts, known as National Bituminous Coal Wage Agreements (NBCWAs), created multi-employer benefit plans that provided health care benefits to active and retired miners and to their dependents. See Pet. App. 4a-5a.

The health care benefits of coal miners, their dependents, and their survivors have for many years been a central issue in labor relations in the coal industry. In 1946, the federal government nationalized the coal industry in response to a UMWA strike over health and retirement benefits. The government and the UMWA subsequently negotiated a contract (the Krug-Lewis Agreement) that, among other things, established employer-sponsored health and retirement programs. In 1947, after the mines were returned to private control, the UMWA and the Bituminous Coal Operators Association (BCOA)

entered into the first NBCWA, which created a multi-employer health and welfare fund. Pet. App. 4a.

In 1950, a successor NBCWA established another multi-employer fund known as the 1950 Welfare and Retirement (W&R) Fund, to provide health care benefits to active and retired miners and to their dependents. Retired miners qualified for health care and other retirement benefits from the 1950 W&R Fund on the basis of portable service credits, which they accrued through their employment with NBCWA signatory operators. Pet. App. 12a. The 1950 W&R Fund was financed through per-ton royalties paid by signatory coal operators according to rates specified in successive NBCWAs or amendments. *Id.* at 4a-5a.

The 1950 W&R Fund provided both health and retirement benefits for active and retired miners until 1974, when Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* In response to ERISA's new funding requirements for pension plans, the 1974 NBCWA divided the 1950 W&R Fund into four "trusts," two of which—known as the 1950 Benefit Trust and the 1974 Benefit Trust—financed medical benefits.[2] The 1950 Benefit Trust provided health care benefits to miners who retired before 1976, and to their dependents. The 1974 Benefit Trust initially provided health care benefits to miners retiring subsequently, to their dependents, and to active miners. The 1974 NBCWA expressly promised that covered retired miners would retain health benefits for life. Pet. App. 5a.

The 1978 NBCWA limited the coverage of the 1974 Benefit Trust to "orphan" retired miners whose last

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[2] The other two trusts covered pension benefits for miners, and are not at issue in this case.

coal industry employer had gone out of business or had otherwise ceased contributing to the trusts, and to their dependents. Responsibility for the health care benefits of non-orphaned retirees, as well as active miners, was shifted to the individual coal operators remaining in business. See *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1118 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996). The 1978 NBCWA contained a guarantee clause, which obligated signatories to make sufficient contributions to ensure payment of the lifetime benefits promised in the 1974 NBCWA, and an "evergreen" clause, binding 1978 signatories to the levels of funding specified in the 1978 and subsequent NBCWAs, whether or not they actually signed subsequent agreements. *Ibid.*

2. By the 1980s, a combination of demographic and economic factors seriously impaired the financial stability of the 1950 and 1974 Benefit Trusts. First, as throughout American industry, the costs of health care rose steeply. Second, structural changes in the coal industry caused substantial reductions in both the number of mine operators that were signatories to the NBCWAs and the number of active coal miners employed by signatory operators. Third, several employers that ended operations successfully contended in court that their obligation to provide health benefits to retired employees ceased with the last NBCWA that they signed, and that the 1974 Plan was responsible for their retirees' medical benefits. Thus, as more operators stopped contributing to the trusts, their withdrawals forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for newly orphaned retirees as well as their own retirees. See Pet. App. 5a.

After a protracted strike at the Pittston Coal Company in 1989, in which health benefits were a major issue, the Secretary of Labor established a bipartisan advisory commission to study the financial crisis confronting the Benefit Trusts. Pet. App. 5a. The Coal Commission identified the escalating costs of paying for "orphan" retirees as a primary source of the financial crisis. *Coal Commission Report: A Report to the Secretary of Labor and the American People* 2 (Nov. 1990) (*Coal Commission Report*). The Coal Commission proposed two possible solutions: an industry-wide funding plan taxing all current coal operators, and a more limited arrangement funded by past and present NBCWA signatories. *Id.* at viii, 60-65.

3. In October 1992, after extensive hearings on the health care crisis in the coal industry and the recommendations of the Coal Commission, Congress enacted the Coal Act. See Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C, 106 Stat. 3036. The Coal Act was intended "to remedy problems with the provision and funding of health care benefits * * * to the beneficiaries of [coal industry] multiemployer benefit plans"; to ensure "sufficient operating assets" for such plans; and "to provide for the continuation of a privately financed self-sufficient program" for delivering health care to the plan beneficiaries. § 19142(b), 106 Stat. 3037. Congress also found that, to ensure the proper functioning of interstate commerce, the coal industry's existing system for funding retiree health benefits should be modified "to identify persons most responsible for plan liabilities." § 19142(a), 106 Stat. 3037.

The Coal Act established a new private multiemployer plan, the UMWA Combined Benefit Fund

(Combined Fund), as the successor to the 1950 and 1974 UMWA Benefit Plans. 26 U.S.C. 9702(a)(1)-(2).[3] The Combined Fund is required to provide beneficiaries of the 1950 and 1974 Plans with substantially the same health benefit coverage that those plans provided. 26 U.S.C. 9703(b)(1). Health benefits under the Combined Fund are limited to retired miners and their dependents who were eligible to receive, and were receiving, benefits from the 1950 and 1974 Plans as of July 20, 1992. 26 U.S.C. 9703(e)-(f). The Combined Fund thus has a closed class of beneficiaries, the membership of which will diminish over time.

The Combined Fund is financed primarily through annual premiums. 26 U.S.C. 9704. Those premiums must be paid by companies that signed one or more NBCWAs, or that made contributions to the 1950 and 1974 Plans under related "me-too" wage agreements that they signed (collectively, signatory operators). See 26 U.S.C. 9701(b)(1) and (3), 9701(c)(1).

The Coal Act bases the amount of premiums on the principles that each signatory operator should bear the cost of providing benefits to its own retirees, and that all signatories should share proportionally in the industry-wide cost of providing benefits to orphan retirees. Toward the first end, the Act directs the Commissioner of Social Security to match beneficiaries of the Combined Fund with the signatory operator responsible for paying for their health care benefits. 26 U.S.C. 9706(a). Assignments are made pursuant to a statutory formula designed to place the primary burden on signatory operators who signed NBCWAs

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[3] The Act also created another plan, the 1992 UMWA Benefit Plan, which is not at issue in this case. See 26 U.S.C. 9712.

in 1978 and thereafter. *Ibid.* If a company ceased participating in NBCWAs prior to 1978, it is not assigned responsibility for its former employees and their dependents unless those employees did not work for any surviving signatory operator that signed an NBCWA in 1978 or thereafter, and unless those employees worked for the company (or a related entity) longer than they worked for any other surviving operator. See 26 U.S.C. 9706(a)(1)-(3).

Signatory operators are also potentially responsible for a proportional share of the premiums for orphan beneficiaries, *i.e.*, retired miners whose former coal industry employers have all gone entirely out of business. To mitigate that additional burden, however, the Act makes available additional sources of funding for the Combined Fund. 26 U.S.C. 9705(a)-(b); 30 U.S.C. 1232(h). Thus far, the existence of those additional funding sources has meant that signatory operators have not been required to pay premiums for unassigned beneficiaries.

4. Petitioner is a coal company that has been engaged in coal mining in Tennessee and Kentucky for more than 50 years. Pet. App. 7a. Petitioner signed the 1950 NBCWA and subsequent labor agreements during the 1950s and early 1960s. *Ibid.* During the time that petitioner conducted unionized mining operations pursuant to those NBCWAs, its employees accrued portable service credits, which were counted in determining their eventual eligibility for health benefits under the 1950 and 1974 Trusts. *Id.* at 12a; see p. 3, *supra*.

In 1964, petitioner stopped employing members of the UMWA and terminated its obligations to the 1950 W&R Fund. Pet. App. 7a. Petitioner has continued to mine coal since 1964 with non-union miners. *Ibid.*

Based on its participation in NBCWAs in the 1950s and 1960s, petitioner has been assigned beneficiaries under the Coal Act and is obligated to pay annual premiums to the Combined Fund.

Petitioner filed suit in the United States District Court for the Eastern District of Tennessee to enjoin the enforcement of its financial obligations under the Coal Act. Petitioner contended that the Coal Act's funding mechanism, as applied to coal operators that ceased to participate in NBCWAs before 1974, violates the Due Process Clause and the Just Compensation Clause of the Fifth Amendment.

The district court granted summary judgment for respondents, upholding the constitutionality of the Coal Act's funding obligations under both the Due Process Clause and the Just Compensation Clause. Pet. App. 23a-37a. Petitioner appealed, renewing both of its constitutional claims, and the court of appeals affirmed. *Id.* at 3a-22a.

The court of appeals first addressed petitioner's due process claim. Pet. App. 9a-17a. Petitioner argued that, because pre-1974 NBCWAs relied on a "pay as you go" funding mechanism for retiree health benefits and did not contractually obligate coal operators to provide lifetime health coverage, requiring pre-1974 NBCWA signatories like petitioner to contribute to the Combined Fund violates the Due Process Clause. *Id.* at 9a-10a. The court of appeals acknowledged that lifetime health benefits "were not vested or guaranteed" by pre-1974 NBCWAs. *Id.* at 4a; see also *id.* at 12a ("It is undisputed that the [pre-1974] NBCWAs did not contain an explicit promise of

lifetime benefits.").[4] However, the court determined that it was nonetheless rational for Congress to include pre-1974 NBCWA signatories, as well as later signatories, in the Coal Act's funding obligations.

The court of appeals identified two legitimate grounds for Congress to assign Combined Fund beneficiaries to pre-1974 signatories who, like petitioner, had employed them before their retirement. First, all NBCWAs, including those signed before 1974, provided miners with portable service credits that contributed to the eventual financial liabilities of the 1950 and 1974 Benefit Trusts. Pet. App. 12a. Because petitioner's UMWA miners had accrued portable service credits during their employment by petitioner—credits that counted toward their eventual eligibility for retirement health benefits (see p. 3, *supra*)—petitioner and similarly situated pre-1974 signatories bore at least some measure of responsibility for the financial liabilities that the Coal Act was designed to redress. *Id.* at 12a, 14a-15a. Second, although pre-1974 signatories did not expressly promise to provide lifetime health benefits, the lengthy and continuous industry practice of providing such benefits had created a legitimate expectation of lifetime coverage on the part of miners, and all NBCWA signatories shared in the responsibility for creating those expectations. *Id.* at 12a-14a.

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[4] Petitioner is therefore wrong when it asserts (Pet. 6) that the court of appeals "differed with the District Court's findings of fact" regarding the contractual obligations of pre-1974 NBCWA signatories. Compare Pet. App. 4a, 12a (court of appeals) with *id.* at 24a, 35a (district court).

The court of appeals then turned to petitioner's takings claim. Pet. App. 17a-22a. The court analyzed the claim by applying the three factors identified by this Court in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986): "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Pet. App. 18a.

In applying those criteria, the parties and the court looked for guidance to this Court's decisions in *Connolly* itself and in *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). *Connolly* and *Concrete Pipe* involved the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, which retroactively imposed statutory "withdrawal liability" on employers who had withdrawn from multiemployer pension plans. This Court held that the MPPAA's withdrawal liability provisions did not amount to an uncompensated "taking" of property, either on their face (*Connolly*) or as applied to an individual employer (*Concrete Pipe*).

Here, petitioner acknowledged that the Coal Act could not be distinguished from the MPPAA with respect to two of the three *Connolly* factors, the Act's economic impact on petitioner and its claimed interference with petitioner's investment-backed expectations.[5] Petitioner therefore relied solely on

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[5] Petitioner asserted that "the economic impact and interference with reasonable investment backed expectations imposed on [petitioner] by the Coal Act are severe, extreme, and substantial," but conceded that "those two factors were also

the "character" of the government's actions as an asserted basis for distinguishing *Connolly* and *Concrete Pipe*. See Pet. C.A. Br. 39 ("[t]he decisive focus * * * has to be on the character of the legislation"). The court of appeals rejected that argument, concluding that the Coal Act did not differ materially from the MPPAA with respect to any of the *Connolly* factors. Pet. App. 19a-22a.

ARGUMENT

This is the latest in a series of cases challenging the constitutionality of the funding mechanisms of the Coal Act. The courts of appeals have been unanimous in rejecting those challenges. See *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832 (6th Cir.), cert. denied, 116 S. Ct. 64 (1995); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996). In each of those cases in which review by this Court has been sought, the Court has declined review. Most recently, in *Davon*, the Court denied petitions for a writ of certiorari presenting exactly the same Just Compensation Clause challenge that petitioner is pursuing in this case. There is no reason for the Court to follow a different course here.

1. Petitioner's constitutional challenge focuses on the inclusion of pre-1974 signatory coal operators in the funding mechanism of the Coal Act. As the court of appeals recognized, however, Congress had sound

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present * * * in each of the [] *Concrete Pipe* line of cases." Pet. C.A. Br. 38.

reasons for requiring pre-1974 signatories as well as later signatories to contribute to the Combined Fund.

Every pre-1974 signatory employed miners who were entitled to receive retirement health benefits from the 1950 and 1974 Benefit Trusts. Those trusts were multi-employer trusts; miners received their entitlement to health care benefits based on portable service credits obtained from operators who signed one of the NBCWAs in effect since 1950. Moreover, those trusts provided "comprehensive health care benefits for retired miners and their families" for 45 years, *Coal Commission Report* vii, and retired miners had "legitimate expectations of health care benefits for life" from the trusts, *id.* at 1. It was therefore appropriate for Congress to require all the coal operators who contributed to the liabilities of the benefit funds to pay some of the cost for restoring the financial stability of the health care system. See *Concrete Pipe*, 508 U.S. at 638.

In addition, all signatory operators benefited substantially from participation in the multi-employer benefit system that was established in the 1940s and faced a crisis in the early 1990s. First, they plainly benefited from their own miners' labor. See 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992) (Coal Act assigns financial responsibility to "those companies which employed the retirees in question and thereby benefitted from their services"). Moreover, all signatory operators benefited from the ease of movement of miners and the labor peace throughout the industry to which those multi-employer trusts (with their portable service credits) significantly contributed. Cf. *Concrete Pipe*, 508 U.S. at 638-639. Congress therefore properly concluded that all signatory operators could be held financially responsible for

making good on the "moral obligation to the [miners] and retirees" to contribute towards the cost of their health care. See *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985).

Congress also reasonably concluded that inclusion of pre-1974 signatory operators in the Coal Act's financing scheme was necessary to secure adequate funding for the health care of retired coal miners and their dependents. Financial and actuarial figures presented at 1991 Senate hearings called into question the feasibility of limiting the so-called "reachback" provision to 1978 and later NBCWA signatories. A more limited reachback provision could well have left a significant number of beneficiaries of the 1950 UMWA Benefit Trust "orphaned." See Staff of House Comm. on Ways & Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 24-27 (Comm. Print 1993); 138 Cong. Rec. H11,413 (daily ed. Oct. 5, 1992) (Rep. Rahall) (noting that "75 percent of the retirees served by the [UMWA] health funds never worked for, or had any connection with, a currently contributing company"). Given that possibility, "[i]t [was] surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

2. In the proceedings below, petitioner contended that the application of the Coal Act to pre-1974 signatories violated both the Due Process Clause and the Just Compensation Clause (see p. 8, *supra*). Petitioner has now abandoned its due process claim, but continues to pursue the taking claim. As this Court has cautioned, however, when "due process argu-

ments [against economic legislation] are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violates the Takings Clause." *Concrete Pipe*, 508 U.S. at 641 (quoting *Connolly*, 475 U.S. at 223). The court of appeals correctly determined that there is no "taking" in this case.

a. As noted above, the only element of the three-factor *Connolly* test that petitioner invoked below to distinguish this case from *Connolly* and *Concrete Pipe* was the "character" of the government's action. As the court of appeals recognized, however, "the character of the Coal Act is identical to the character of the MPPAA." Pet. App. 21a-22a. In *Connolly*, the Court explained that the government's imposition of withdrawal liability under the MPPAA "d[id] not physically invade or permanently appropriate any of the employer's assets for [the government's] own use," but instead imposed a financial obligation on employers to "safeguard[] the participants in multi-employer pension plans." 475 U.S. at 225. The same is true here: the government has not taken any identifiable property of coal operators for its own use, but has only required the operators to contribute financially to a private entity that is responsible for paying the health care costs of retired miners.[6]

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[6] The Combined Fund established by the Coal Act is itself a private plan (see 26 U.S.C. 9702(a)(2)), and the Coal Act carries forward the privately negotiated health benefit scheme that the Combined Fund's predecessors operated prior to 1992. The Combined Fund provides benefits to the same people who were receiving benefits from the predecessor plans, and it provides the same medical coverage that they enjoyed prior to enactment of the Coal Act. 26 U.S.C. 9703(b)(1), 9703(f). In

The Coal Act, like the MPPAA, implements a "public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225. Even though it might be said that the Coal Act requires petitioner to devote its assets to satisfying its new financial obligations to the Combined Fund, "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Id.* at 223. Thus, petitioner "has not identified any of its property that was taken without just compensation." *Sperry*, 493 U.S. at 59.

b. *Connolly* and its progeny also look to the economic impact of the challenged regulation on the plaintiff. *Concrete Pipe*, 508 U.S. at €45; *Connolly*, 475 U.S. at 225. The court of appeals determined that petitioner's liability under the Coal Act is "at least roughly proportional" to its experience with the Combined Fund's predecessor funds. Pet. App. 19a.[7] The court noted, *inter alia*, that nearly all of the beneficiaries assigned to petitioner under the Coal Act were its former employees or their family members; that petitioner had provided service credits to those employees that counted toward their retirement health benefit eligibility; and that the Act assigned beneficiaries to petitioner only when they could not

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short, the Coal Act perpetuates the basic contours of a privately negotiated multi-employer benefit plan.

[7] It is undisputed that the relevant inquiry involves the proportionality of the burden rather than its absolute magnitude. See *Concrete Pipe*, 508 U.S. at 645; *Davon*, 75 F.3d at 1127-1128; *Chateaugay*, 53 F.3d at 494.

be assigned to signatories of more recent NBCWAs. *Id.* at 19a-20a.

Petitioner asserts (Pet. 15, 17) that the Coal Act's impact on it is disproportionate because the coal industry's health fund was not contractually liable for lifetime health benefits prior to 1974. Petitioner further argues (Pet. 18) that pre-1974 NBCWA signatories "did nothing to compel or even influence the 1974 contract negotiations that resulted in lifetime benefit entitlements."

This argument erroneously treats the 1974 NBCWA as a fundamental break between the coal industry's prior and subsequent retirement health care arrangements. As the Seventh Circuit pointed out in *Davon*, with regard to the issue of lifetime health coverage, "[n]othing radical happened in 1974." 75 F.3d at 1128. The express promises of lifetime benefits made to miners in 1974 and thereafter did not spring into existence from a void. Instead, the contractual guarantee of lifetime health benefits, and the health plan's corresponding contractual liability to employees and their dependents, were the direct products of more than 20 years of industry practice regarding health benefits under pre-1974 NBCWAs, including those to which petitioner was a party. As explained above, the health care system created by pre-1974 NBCWA signatories contributed to the legitimate expectations of miners and their dependents, and the explicit contractual guarantees provided in 1974 and thereafter were products of those expectations. Thus, the actions of pre-1974 signatories like petitioner did contribute, albeit indirectly, to the ultimate liabilities of the industry's health plans. See *ibid.*

Petitioner's argument presupposes that contractual liability is the benchmark of proportionality for Just Compensation Clause purposes. But nothing in *Connolly* or *Concrete Pipe* supports that premise.[8] As the Second Circuit held in *Chateaugay*, it is "the employment relationship [that] supplies the rational link": "[b]y * * * mooring a given company's funding obligations to a legitimate measure of its prior benefit from the UMWA health care system, the Coal Act rationally apportions future financial responsibility according to past contributions." 53 F.3d at 494. As explained above, petitioner's funding obligations are directly tied to its past employment of miners receiving health benefits under the Coal Act, and the Act in fact skews the assignment of beneficiaries away from companies like petitioner that did not sign NBCWAs after 1974 (see pp. 6-7, *supra*). Under these circumstances, measuring the Act's financial obligations against the "yardstick * * * of proportionality" (*Chateaugay*, 53 F.3d at 494) hardly suggests that petitioner has suffered an unconstitutional taking.

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[8] Petitioner asserts that the existence of contractual liability was *"essential"* to the holdings in *Connolly* and *Concrete Pipe* (Pet. 14). But *Connolly* actually points in precisely the opposite direction. As the Court there explained, "[a]ppellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it agreed. * * * If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." 475 U.S. at 223-224. *Connolly* thus makes clear that existing contractual obligations do *not* mark the limit of the government's authority under the Just Compensation Clause.

c. The remaining *Connolly* factor is the extent to which the statute interferes with "distinct investment-backed expectations" on the part of the regulated party. *Connolly*, 475 U.S. at 225. The court of appeals determined that the Coal Act did not interfere with petitioner's reasonable investment-backed expectations in a way that weighs in favor of finding a taking. Pet. App. 20a-21a. Although petitioner argues otherwise, it does not identify any distinct investments that were undertaken or foregone in the expectation that it would remain free from liability for the costs of its former employees' retirement health care.

In *Connolly*, employers who had withdrawn from a multi-employer pension plan when such withdrawal was fully free from liability contended that the subsequent, retroactive imposition of withdrawal liability by Congress upset their reasonable expectations. This Court concluded, however, that because pension plans had long been the objects of legislative concern even before the enactment of ERISA, prudent employers had more than sufficient notice before enactment of the withdrawal liability provisions that withdrawal might trigger future financial obligations. 475 U.S. at 227.

Here too, the long history of federal involvement in the coal industry (and particularly in the issue of health benefits for coal miners) belies the notion that pre-1974 NBCWA signatories could have reasonably expected future immunity from further contribution toward meeting the costs of retired employees' health benefits. As early as 1946, when the government nationalized the coal mines and negotiated the Krug-Lewis Agreement, it was clear both that the stability of the coal industry demanded adequate employee

health and welfare benefits, and that the federal government was prepared to intervene to ensure the availability of those benefits. The first multiemployer welfare and retirement fund, set up by the 1946 Krug-Lewis Agreement, was managed by three trustees, one of whom was appointed by the federal government. *Coal Commission Report* 18-19.[9] From that point on, the federal government's involvement in establishing the health care delivery system for retired miners was extensive. *Id.* at 21, 22, 23, 28. Thus, signatory operators who ceased to contribute to the industry's multiemployer health benefit program can hardly have expected that they would escape all financial responsibility in the event of further federal intervention on behalf of their former employees.

3. In asking this Court to review the decision below, petitioner argues primarily (Pet. 8-15) that the evidence it presented to the district court created a genuine issue of material fact, making it inappropriate for the district court to enter summary judgment against petitioner. Whether the state of the record in this case was sufficient to support summary judgment is a factbound question that does not warrant consideration by this Court. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In any event, nothing about the evidence proffered by petitioner required the district court to

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[9] Indeed, the Coal Commission noted that the multiemployer funds providing health care benefits to retired miners were created "in the White House in a contract between the federal government and the UMWA." *Coal Commission Report* vii.

engage in a factfinding trial before the constitutionality of the Coal Act could be determined.

The evidence relied on by petitioner, such as statements by the trustees of the 1950 W&R Fund about the non-vested character of the Fund's benefits, indicates that pre-1974 NBCWAs did not contractually obligate coal operators to provide lifetime health benefits (*e.g.*, Pet. 9).[10] But the decisions of the district court and the court of appeals do not rest on a contrary view of the facts. To the contrary, as noted above, the district court and the court of appeals both expressly acknowledged the absence of binding contractual obligations on the part of pre-1974 signatories. See Pet. App. 4a, 12a, 14a (court of appeals); *id.* at 24a, 35a (district court). Petitioner was not entitled to a trial to "prove" a matter that the courts below both accepted as true for purposes of their decisions.

Petitioner appears to contend that, because pre-1974 signatory operators were not contractually obligated to provide miners with lifetime health benefits, the court of appeals had no basis for determining that miners had legitimate expectations of receiving lifetime care. That is a *non sequitur*. As the court of appeals pointed out, the coal industry provided lifetime health coverage for retired miners virtually without interruption for more than 40 years, from the signing of the first NBCWA in the late 1940s until the enactment of the Coal Act in 1992. It was

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[10] We note that substantially the same evidence was presented to the district court and the Seventh Circuit in *Davon*. See, *e.g.*, *Templeton Coal Co.* v. *Shalala*, 882 F. Supp. 799, 815 (S.D. Ind. 1995), aff'd *sub nom. Davon, Inc.* v. *Shalala*, 75 F.3d 1114, cert. denied, 117 S. Ct. 50 (1996).

the existence of this "continuous mechanism" (*Davon*, 75 F.3d at 1125), not the presence of explicit contractual guarantees, that gave rise to legitimate expectations of continued health coverage on the part of miners and their dependents. Each successive NBCWA contributed to the development and maintenance of that system, and all NBCWA signatories played a role in the resulting expectations of the health funds' beneficiaries. Thus, to the extent that the court of appeals' Just Compensation Clause analysis depends on the legitimate expectations of the Combined Fund's beneficiaries, the decision is firmly grounded in industry experience.

Petitioner also urges this Court (Pet. 16-17) to grant review in order to adopt the views expressed in Justice Scalia's dissent in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), and Justice O'Connor's concurring opinions in *Connolly* and *Concrete Pipe*. The decision below, however, is entirely consistent with those views. Because all NBCWA signatory operators, including pre-1974 signatories, played at least some part in the eventual development of the health care crisis that led to the Coal Act, this is not a case in which the government is compelling "one citizen [to] pay * * * to remedy a social problem that is none of his creation." *Pennell*, 485 U.S. at 23 (Scalia, J., dissenting). And for the reasons set forth above, the Sixth Circuit and the other courts of appeals had ample basis for finding that the conduct of pre-1974 signatories "make[s] it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility." *Concrete Pipe*, 508 U.S. at 647-648 (O'Connor, J., concurring); see generally *Connolly*, 475 U.S. at 228-236 (O'Connor, J., concurring).

The fundamental question under the Just Compensation Clause is whether Congress is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227. That is not the case here. It was eminently reasonable for Congress to conclude that NBCWA signatories as a class bear a collective responsibility, and one greater than that of the public as a whole, for the health care of retired coal miners and their dependents. Coal operators such as petitioner benefited from the labor of those miners as well as from the multi-employer health care system established to benefit the coal industry as a whole. Companies that left the collective bargaining process left behind miners whose retirement health care costs were ultimately borne by other operators. Under those circumstances, "fairness and justice" do not require the public at large to assume the costs of the Combined Fund, nor do they entitle petitioner to immunity from those costs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996

REPLY

BRIEF

Supreme Court, U.S.
FILED
NOV 27 1996
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(A)

No. 96-431

In The

Supreme Court of the United States

October Term, 1995

BLUE DIAMOND COAL COMPANY,

Petitioner,

vs.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY and MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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Justice Holmes has declared that the Takings Clause question "depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). This Court should grant review of this case to rule on how those "particular facts" should be determined. The petitioner, Blue Diamond Coal Company, has submitted substantial evidence to the courts below, and to this Court, plainly establishing that it played no role in the creation of "legitimate expectations of lifetime health care benefits" on the part of its UMWA-affiliated employees and their families. Pet. at 9-10. Despite this, the respondents nevertheless insist that Blue Diamond did play such a role, and that role is what renders the Coal Act a "regulation" (of those "legitimate expectations") instead of a "taking" of Blue Diamond's money. The Sixth Circuit Court of Appeals, following the lead of the Seventh Circuit Court of Appeals in *Davon, Inc. v. Shalala,* 75 F.3d 1114 (7th Cir. 1996), resolved this *fact issue* against Blue Diamond, upon the respondents' motions for summary judgment.

That result cannot be justified as proper summary judgment procedure. In these summary judgment proceedings, it was Blue Diamond's version, and proof, regarding disputed issues of fact, that should have been "presumed correct," and not the allegations of the movants. *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 456 (1992). Nor can that result be justified, on a Constitutional basis, on the grounds that legislative factual determinations, or assumptions, must be deemed correct if they have a "rational basis." This Court has expressly rejected "rational basis" as the standard of review for Takings Clause cases. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Dolan v. City of Tigard,* 114 S.Ct. 2309 (1994). As even the dissent in *Nollan* recognized, the Takings Clause incorporates Constitutional values distinct from the Fifth Amendment's Due Process Clause, and those values can be protected only by a *factual* judicial inquiry into the pertinent Takings Clause concerns. *See* Footnote 1 of Dissent, *Nollan,* 483 U.S. at 843. It is no answer to this case, as respondents suggest, that the

Coal Act may be "rational" economic legislation. Most respectfully, THE FAIRNESS AND JUSTICE GUARANTEED TO PROPERTY OWNERS BY THE TAKINGS CLAUSE CANNOT BE SUSTAINED BY RATIONALIZATIONS, PARTICULARLY FALSE ONES!

The respondents ignore these concerns. Instead, they continue to present their own distorted version of history, and their own distorted version of this case,[1] as truth, ignoring the foregoing precedents of this Court that reject the procedures by which "the truth" has been ascertained in this case, so far. Neither respondents nor the lower courts attempt to analyze the tripartite Takings Clause inquiries in terms of Blue Diamond's facts, which *Eastman Kodak* teaches should have been "presumed correct" from the very beginning.

First, as to the character of the Coal Act, the statute is indeed similar, but not identical, in nature to the Multi-Employer Pension Plan Amendments to ERISA (MEPPA) sustained by this Court in *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211 (1986) and *Concrete Pipe and Products of Calif., Inc.*

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1. In the District Court, Blue Diamond objected and moved to strike many of the factual allegations contained in the respondents' briefs, including their ultimate factual allegation that Blue Diamond helped to foster "legitimate expectations of lifetime benefits." The grounds for Blue Diamond's objection and motion were that the respondents' allegations were not established in their proof, were disproven by Blue Diamond's proof, and were ultimately shown to be untrue. Sixth Circuit Joint Appendix pp. 485-495, Plaintiff's Objection, Motion to Strike, and Response to Defendants' Statements of Undisputed Fact and Proposed Conclusions of Law. The District Court found Blue Diamond's objections and motion "well taken," and sustained it. Sixth Circuit Joint Appendix pp. 500-501, Order of October 4, 1994. The Sixth Circuit, like the respondents here ignored this ruling of the District Court. Unfortunately, the catalog of misstatements in respondents' factual presentations is too extensive for a point-by-point rebuttal in a Reply Brief limited to ten pages.

v. Construction Laborers Pension Trust, 508 U.S. 602 (1993). No court below discussed the key factual difference between the two statutes. The MEPPA imposed the cost of unfunded vested liabilities upon those employers who created them. *See Connolly* and *Concrete Pipe*. The Coal Act, as applied to pre-1974 UMWA contract signatories, imposes the cost of unfunded vested liabilities upon employers who *did not create them*. The lower courts either ignored this difference altogether, as the Sixth Circuit did in its Takings Clause "character" analysis, or else assumed, on the basis of "rationality," that the difference did not exist, as the Seventh Circuit did in *Davon*. Either way, fairness and justice to the affected property owners was not served.

Second, as to the economic impact and proportionality of the Coal Act to pre-1974 signatories' "experience with the plan," no court below discussed proportionality in terms of the employer's "share of plan obligations incurred during [the employer's] association with the plan." *Concrete Pipe*, 508 U.S. at 643. The pre-1974 UMWA fund never incurred any long-term obligations whatsoever. Thus, not one of the lower courts reviewed "proportionality" by the same criteria this Court reviewed proportionality in *Connolly* and *Concrete Pipe*.

Third, as to reasonable investment-backed expectations, this Court in *Connolly* and *Concrete Pipe* found it unreasonable for employers to expect no liability, on the basis of their contracts, for "promised benefits." *Concrete Pipe*, 508 U.S. at 646. That finding was swayed primarily by the fact that each employer stood concurrently liable, notwithstanding their contracts, for unfunded vested benefits under ERISA anyway. The lower courts in this case found it unreasonable for employers to expect no liability, on the basis of their contracts, for benefits *they never promised*. No regulation of law existed, before 1974, that required Blue Diamond, or other pre-1974 signatories to fund retirement benefits, and particularly benefits they never

promised, under any circumstances! To reach their totally illogical and unjust conclusions against legitimate *employer* expectations, every court below, with the exception of District Judge Hull in this case, relied materially upon the pure rationalization that those employers had nonetheless "fostered legitimate expectations of lifetime benefits." So we are back full circle, with the Constitutionality of the Coal Act as applied to pre-1974 UMWA signatories, under the Takings Clause, resting exclusively upon a rationalization that Blue Diamond has proven *false.*

There is no fairness, and no justice in rewriting history to accommodate social welfare goals. There is no fairness, and no justice, in purported justifications that can pass as rationalizations, but not as truth. There is no fairness, and no justice in requiring Blue Diamond Coal Company to pay the cost of a promise, or, if you will, the cost of "legitimate expectations," *it manifestly did not make.*

The integrity of the Takings Clause as a guarantee of fairness and justice to property owners, and not a guarantee of mere rationality, compels the conclusion that this Court must grant certiorari in this case.

Respectfully submitted,

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